APPEAL NO. 031089
FILED JUNE 23, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on March 26, 2003. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 11th and 12th quarters, and that he has not gone 12 consecutive months without entitlement to SIBs so he has not permanently lost entitlement to SIBs pursuant to Section 408.146(c). The appellant (carrier) appealed, contending that there was no narrative specifically explaining how the injury causes a total inability to work and that there are other records that show the claimant can return to work in some capacity. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

The claimant sustained a compensable injury on _____. The parties stipulated that the claimant received a 34% impairment rating; that the qualifying period for the 11th quarter was April 5 through July 4, 2002; and that the qualifying period for the 12th quarter was July 5 through October 3, 2002. The claimant testified that during the relevant time period he had a total inability to work due to his compensable injury and that he made no job searches. The carrier argued that the claimant did have some ability to work during the relevant time period and that, because the claimant failed to make a good faith job search, he is not entitled to SIBs for the 11th and 12th quarters. The hearing officer found that the claimant had previously been determined not to be entitled to SIBs for the 8th, 9th, and 10th quarters. Both parties submitted medical evidence into the record, which they argued supported their respective positions.

Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) sets out the eligibility requirements for SIBs. At issue is whether the claimant made the requisite good faith effort to obtain employment commensurate with his ability to work as provided for in Section 408.142(a)(4) and Rule 130.102(b)(2). Rule 130.102(d)(4) provides that the statutory good faith requirement may be met if the employee:

> (4) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work[.]

At issue here is whether the claimant submitted a sufficient narrative report, which specifically explains how the injury causes a total inability to work, and whether other records show that the injured employee is able to return to work.

The hearing officer determined that the claimant provided narrative reports from Dr. E and Dr. C, which specifically explain how the injury causes a total inability to work. We have held that the reports from two different doctors cannot be read together to create a narrative report. The narrative report must come from one doctor. Texas Workers' Compensation Commission Appeal No. 011152, decided July 16, 2001. Because the hearing officer discusses the two doctor's reports together, it is unclear from the decision whether he determined that each doctor had supplied a narrative, or if he determined that when read together, the two doctor's reports constituted a narrative. Our review of the record indicates that the hearing officer could have determined that Dr. E's June 13, 2002, report was sufficient to constitute a narrative report under Rule 130.102(d)(4).

The hearing officer determined that the functional capacity evaluation report (FCE) of September 13, 2001, and the report of Dr. K showing some ability to work, does not adequately address the claimant's physical condition during the relevant time period because the claimant's condition had deteriorated since the FCE was performed. In cases where a total inability to work is asserted and there are other records which on their face appear to show an ability to work, the hearing officer is not at liberty to simply reject the records as not credible without explanation or support in the record. Texas Workers' Compensation Commission Appeal No. 020041-s, decided February 28, 2002. However, "[t]he mere existence of a medical report stating the claimant had an ability to work alone does not mandate that a hearing officer find that other records showed an ability to work. The hearing officer still may look at the evidence and determine that it failed to show this." Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000. Both the FCE and Dr. K's report were done almost seven months prior to the commencement of the relevant qualifying periods. A report from Dr. C dated October 15, 2002, indicates that the claimant's condition had deteriorated. There is sufficient evidence to support the hearing officer's determination that both the FCE and Dr. K's report do not adequately address the claimant's physical capabilities during the 11th and 12th quarters.

In a report dated October 15, 2002, Dr. C concludes that the claimant is not employable. In support of this conclusion, Dr. C writes:

> I concur with [Dr. E] that [claimant] is really not capable of returning to gainful employment. He can perform activities of daily living and he can even do some significant things on brief periods and at his own pace, but not on a routine basis such as would be required at a job. Sedentary activities, I think, are also very difficult for him because he can't sit with his head down for any particular period of time. He can't look up at all without passing out, and though he may on a sporadic basis be able to do sedentary work, it would not be consistent enough to hold a job.

While we agree with the hearing officer's determinations that the claimant submitted a sufficient narrative report pursuant to Rule 130.102(d)(4), and that the September 13, 2001, FCE and Dr. K's report from September 17, 2001, do not

constitute other records showing some ability to work during the relevant time period, we do not agree that no other record showed that the claimant had some ability to work during the relevant time period. The test is not whether the claimant can obtain and retain "gainful employment" or full-time employment. Dr. E speaks in terms of the claimant being able to do "sporadic" sedentary work. As such, we hold the hearing officer's determination that the claimant is entitled to SIBs for the 11th and 12th quarters because he was unable to perform any type of work in any capacity during the relevant qualifying periods to be against the great weight and preponderance on the evidence. As such, we reverse that determination and render a new decision that the claimant is not entitled to SIBs for the 11th and 12th quarters because the evidence shows that he had some ability to work and failed to make a good faith effort to obtain employment. Because we have reversed the hearing officer's determination regarding the claimant's SIBs entitlement, we likewise reverse the determination that the claimant has not permanently lost entitlement to SIBs pursuant to Section 408.146(c).

The hearing officer's decision and order that the claimant is entitled to SIBs for the 11th and 12th quarters, and that the claimant has not permanently lost entitlement to SIBs pursuant to Section 408.146(c) is reversed and a new decision is rendered that the claimant is not entitled to SIBs for the 11th and 12th quarters, and that he has permanently lost entitlement to SIBs pursuant to Section 408.146(c).

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica Lopez-Ruberto
Appeals Judge

_____
Michael B. McShane
Appeals Panel
Manager/Judge